

# THE ROAD TO WATERGATE AND BEYOND: THE GROWTH AND ABUSE OF EXECUTIVE AUTHORITY SINCE 1940

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You've got to protect the President from the dirty stuff. There's got to be a break. The President can't survive [if he is tied to this sort of activity—illegal mail openings]. But somebody's got to take the heat. So let old Helms take it, and I'm taking it.

Richard Helms, Oct. 21, 1975<sup>1</sup>

[T]he power of the President was viewed by some in the [Nixon] White House as almost without limit; especially when national or internal security was invoked, even criminal laws were considered subordinate to Presidential decision or strategy.

Ervin Committee *Final Report*, 1974<sup>2</sup>

## INTRODUCTION

The investigation of Watergate, as well as other inquiries, revealed a host of presidential illegalities: break-ins, buggings, violations of privacy, cover-ups, abuse of the national security machinery (Justice Department, FBI, CIA, NSA) and related agencies (especially the Internal Revenue Service). In the aftermath of Watergate, many Americans have asked, "How could President Nixon have been so wrong as to believe that he could get away with it—the break-in, bugging, and cover-up?" This question overlooks two fundamental points: first, that he did almost get away with "it"; and second, that he had reason to believe that he would succeed because his actions were, in important ways, similar to earlier executive misuse of power, especially in the area of internal security, often involving the FBI.<sup>3</sup>

According to this thesis, Watergate was a culmination of the growth<sup>4</sup> and

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1. San Francisco Chronicle, Oct. 23, 1975, at 13, col. 6.

2. SENATE SELECT-COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, 93D CONG., 2D SESS., FINAL REPORT 3 (1974).

3. This paper assumes that some of the significant trends can be traced back well before Franklin Roosevelt's administration, but that seems to be the important seedbed for the present, partly because the claims of crisis and of national security maintained salience throughout the years since 1940. See, e.g., two other papers in this symposium: Patterson, *The Rise of Presidential Power Before World War II*, 40 LAW & CONTEMP. PROB. no. 2, at 39 (1976); Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROB. no. 2, at 12 (1976).

4. This analysis does not rest on the answer to a related question: whether the Nixon administration's actions, in their entirety, expressed a systematic disregard for law while other ad-

abuse of presidential and executive power since 1940 in both domestic and foreign affairs, including the many deceptions of World War II and the Cold War, the lies of the Vietnam War, and the “dirty tricks” of the CIA. The results have been a corruption of the polity, an erosion of congressional authority, a systematic use of deceit and manipulation, and a subversion of law and the Constitution. Much of this has been justified by the dangerously elastic rationale of “national security”—of a nation imperiled by a menace (first fascism, then communism) at home and abroad.

# I

## WATERGATE: THE UNEXPECTED UNRAVELLING OF A CONSPIRACY

What was Watergate? A “third-rate burglary”<sup>5</sup> accidentally discovered and a cover-up that slowly unravelled. Why should Americans marvel at Nixon’s belief that he could get away with it? He almost did, as I have just observed, and other administrations, as well as national security agencies, have gotten away with similar, perhaps even worse, acts.<sup>6</sup>

Nixon was not irrational or unreasonable—only as it happened, wrong—in believing that he could halt the inquiry into Watergate well before it reached the oval office. It took an unpredictable set of circumstances—a maverick judge, John Sirica, and enterprising reporters of a daring anti-Nixon newspaper,<sup>7</sup> the *Washington Post*, to trace the crime to the White House and bring down the President.

Remember that in 1972, few responsible Americans, especially the press pundits and academic analysts, thought that Watergate was much more than a minor break-in. Few listened seriously to George McGovern’s agonizing cries, in the last days of his woeful campaign, when he charged the GOP with these

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ministrations expressed only an episodic disregard for law. Such a comforting distinction between “systematic” and “episodic” assumes that we know as much about earlier administrations as we do about Nixon’s in these areas. We do not. Without the inquiry into Watergate, there would have been few investigations of Nixon’s administration, and probably they would have disclosed very little. In the past half century, no other administration has been subjected to such intensive investigative scrutiny as Nixon’s, and many of the ugly disclosures about Franklin D. Roosevelt and his successors have emerged years after the events, as a result of investigations of Nixon. Some critical sources (*e.g.*, J. Edgar Hoover’s special files) have been destroyed, and many other materials, especially at presidential libraries, are still closed to scholars, so there are substantial barriers at the present to those who want to examine in great depth illegal behavior by administrations in the years after 1940.

5. White House statement, in SENATE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, *supra* note 2, at 2.

6. Critics have correctly pointed out that the Watergate break-in and bugging were anomalous in at least one important respect: The Committee for the Re-Election of the President hired its own “army” and did not depend on the FBI. Why? Perhaps the FBI was not judged reliable, and there may have been fear that the agency could use the information against CRP and the Nixon administration.

7. Conversations between William Graham and the author (1969-1970).

"dirty tricks." So great was the will of most Americans to believe in the sanctity of the national election, so great was their faith in the Presidency and in the national leadership of the two parties, that few outside the McGovern camp found the charges plausible. McGovern did not understand America, as one prominent historian explained, for he was addicted to European themes of conspiracy. McGovern's charges were the product of the same dangerous mentality, a noted legal scholar decreed, that lacked faith in the Warren Commission report and mistrusted the CIA.<sup>8</sup>

American citizens, whether lay people or scholars, even when criticizing particular administration policies, preferred to believe in the morality of high office holders, and the press has helped maintain this faith. The established press had long been reluctant to publish information that might challenge the legitimacy of the American system or its leaders. By its definition of responsibility, the press had often excluded disruptive themes, disregarded or minimized troubling events, and failed to investigate unsettling charges. Natural caution, fear of offending the powerful, anxiety about seeming irresponsible—all these reinforced the national media's desire to serve as a bulwark of legitimacy and stability.

The painful events of the sixties threatened this legitimacy and stability. The war, the demonstrations and police confrontations, the race riots and burnings, and the assassinations had a two-pronged, paradoxical effect: they broadened the dialogue and encouraged investigatory reportage, yet also constrained many analysts in the mainstream. There was a deep fear that the social fabric was being torn apart amid the talk of revolution, the cries of genocide and imperialism, and the accusations of racism. With the fear of disorder, the major press would have had no enthusiasm—not even willingness—to trace a Watergate break-in to the White House had it happened in, say, 1968 or 1970. The nation, many responsible citizens believed, could not have endured under the added burden of such disclosures.

Ironically, it was Richard Nixon's misfortune that the Watergate break-in coincided with the relaxation of social tensions. By 1972, few Americans still feared that their society might come apart, for the various radical movements, both black and white, were themselves in disarray, and the end of the war seemed near.

More than restoration of confidence was needed, however, to bring down the President—it took an unusual judge and a crusading newspaper. Had John Sirica, whose career had not been marked by dignity or decorum, not assiduously pursued the Watergate matter, he might have simply sentenced Liddy, Hunt, McCord, and the others to brief terms. It would have remained

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8. These statements are from personal conversations, and there is no need to embarrass the sources by identifying them by name.

a "third-rate burglary," little more. But Sirica pressed beyond, found the weak link (McCord), broke the chain of silence, and squeezed out more information than probably even he anticipated.

Perhaps equally critical were the efforts, starting earlier, of Carl Bernstein and Bob Woodward, two investigative reporters, who worked for a paper and publisher eager to uncover Nixon's wrongdoings. Their investigation was not a vendetta, but there was untrammelled enthusiasm at the *Post*. Lacking were the normal impediments and restraints—loyalty to high office or personal affection for the President. John F. Kennedy and Lyndon B. Johnson could, and perhaps did, count on such deterrents to block inquiries into sticky matters, and they were protected. Nixon, instead, had earned the hatred of the publisher, which freed Bernstein and Woodward to follow their tips all the way to the White House.<sup>9</sup> The *Washington Post's* bold crusade required the financial strength and prestige that only a few major papers possessed, and the others, including the *New York Times*,<sup>10</sup> had not been prepared to embark on such a risky course. Without the *Post*, we may conclude, the Watergate investigation might have ended safely for Nixon—far from the oval office.

## II

### THE GROWTH AND ABUSE OF EXECUTIVE POWER: THE EROSION OF CIVIL LIBERTIES AT HOME

The growth of concern about "national security," both at home and abroad, has made it easy for presidents and their associates, whether aides or cabinet members, to seek political intelligence from federal intelligence agencies (especially the FBI) for partisan or personal purposes, to link these self-serving goals with national security, and to allow these agencies to expand their authority and influence, even to move into illegal and dubious activities. The result, most notably in the case of the FBI (about which we now know the most), is that the agency was often restrained by neither the Executive nor Congress, that it was usually willing to do the political bidding of the Executive, that it occasionally curried favor with some congressmen by leaking secrets to them, and that it was often able to determine its own rules and practices. "The FBI intelligence system developed to a point," concluded the staff of the Church Committee, "where no one inside or outside the Bureau was willing or able to tell the difference between legitimate national security or law enforcement information and purely political intelligence."<sup>11</sup>

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9. C. BERNSTEIN & B. WOODWARD, *ALL THE PRESIDENT'S MEN* (1974).

10. The skimpy public evidence does not reveal why the *New York Times* did not pursue the Watergate case with the same ardor. Perhaps the earlier battle over the Pentagon Papers left the paper reluctant.

11. STAFF OF SENATE SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO

The record of political abuses involving the FBI did not begin with Richard Nixon. Well before he entered the White House, other administrations, starting with Franklin Roosevelt's, had been directing the Bureau to serve their partisan and personal needs; the agency had done so, often eagerly, sometimes even proffering unsolicited information. This relationship with the Executive, despite many variations in tone and detail, enabled the FBI to expand its power and to gain independence of administration oversight. It outmaneuvered Attorneys General, who came and went, while J. Edgar Hoover, its shrewd director, flourished amid the acclaim that he helped generate for self and agency. He skillfully defended himself and his agency (which came to seem identical) within both the executive branch and the Congress. With the help of both, as well as of the media with whom he ably curried favor, Hoover created and polished the familiar image of the FBI as being beyond the reach of politicians—an independent, trusted guardian of the nation, beholden only to justice.<sup>12</sup>

That image, as critics on the Left have long charged,<sup>13</sup> had little relationship to reality. But, aside from the FBI's wretched record in civil rights for racial minorities, an issue that surfaced in the sixties, the agency was generally exempt from much public or scholarly criticism until recently. Despite occasional disclosures of overzealous investigation or intended repression of the Left or extreme Right, most citizens were untroubled.<sup>14</sup> Marginal, dissident movements and organizations, well outside the two-party system, have seldom been able to expect much protection under the law. Most Americans happily endorse such a political double standard, and the Executive has seldom been troubled by political repression and illegal acts directed against groups outside the mainstream of politics: the Communist Party, the Socialist Workers Party, sections of the New Left, and the Ku Klux Klan.

This growth of FBI powers both expanded and contracted presidential power. This is not a paradox. The Chief Executive and the Attorney General lost some power over the agency, but its actions often gave these officials more power over the society. Beginning in the Roosevelt years, J. Edgar Hoover began eroding presidential and executive control of the FBI; he carved out areas of virtual autonomy. Despite their legal authority, Presidents and Attorneys General acceded, acquiesced, or even allowed FBI illegalities

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INTELLIGENCE ACTIVITIES, 94TH CONG., 1ST SESS., REPORT ON POLITICAL ABUSE AND THE FBI (Comm. Print 1975); cf. Theoharis, *The FBI's Stretching of Presidential Directives, 1936-1953*, 91 POL. SCI. Q. 649 (1976).

12. 6 *Hearings Before the Senate Comm. to Study Government Operations with Respect to Intelligence Activities*, 94th Cong., 1st Sess. 200-01 (1976) [hereinafter cited as *Intelligence Activities Hearings*]; F. COOK, *THE FBI NOBODY KNOWS* 167-203 (1964).

13. F. COOK, *supra* note 12; Levine, *Hoover and the Red Scare*, 145 NATION, Oct. 20, 1962, at 232.

14. A. WOLFE, *THE SEAMY SIDE OF DEMOCRACY: REPRESSION IN AMERICA* 33-124 (1973); Memorandum from the FBI (Jan. 12, 1976), in 6 *Intelligence Activities Hearings* 992-95.

and improprieties. Officials were unwilling to do battle with Hoover. The cost could be too great. The likelihood of defeat was high, the value of victory marginal. Often top officials acted as if they preferred not to know when the FBI violated or stretched the law. These agency actions sometimes served the President's purposes, by giving him and the Attorney General more power over sectors of the society—through using political intelligence, blocking dissent, and thwarting dissident movements.

#### A. The Roosevelt Administration

The record of political abuses begins with President Franklin Roosevelt, during whose administration the FBI also began to develop its lustrous reputation. Roosevelt, apparently misusing presidential authority and violating the law, ordered the FBI to wiretap various associates, including Tommy ("the Cork") Corcoran and Harry Hopkins, whose wife, the President suspected, was passing politically damaging material to the anti-New Deal press. The Bureau, as the President anticipated, became a willing ally in political espionage and in dirty bureaucratic politics.<sup>15</sup>

Roosevelt also used the FBI to gather information on self-admitted critics of his foreign policy—especially those who wrote letters to the White House criticizing him for interventionism. His secretary sent the letters to J. Edgar Hoover with the gentle suggestion, "The President thought you might like to look them over, noting the names and addresses of the senders."<sup>16</sup> Hoover gave the White House information on those people already in Bureau files and opened files on others. "You have done and are doing a wonderful job," Roosevelt wrote Hoover, expressing "gratitude and appreciation."<sup>17</sup>

The President also greatly expanded FBI powers to conduct electronic surveillance. Even though recent Supreme Court interpretations seemed to bar the federal government from using wiretaps to gather information, Roosevelt boldly authorized their use for national security purposes. On May 21, 1940, he sent a confidential directive to Attorney General Robert Jackson:<sup>18</sup>

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15. REPORT ON POLITICAL ABUSE AND THE FBI, *supra* note 11, at 2-3; N.Y. Times, July 19, 1973, at 20, col. 7.

16. Letter from Stephen Early to J. Edgar Hoover (May 21, 1940) (on file in Official File 10B, box 14, Franklin D. Roosevelt Library, Hyde Park) [hereinafter cited as FDR Library OF]. See also Letters from Stephen Early to J. Edgar Hoover (May 18 & 29, 1940); Letter from F.D. Roosevelt to Stephen Early (May 21, 1940); Letter from Rudolph Forster to J. Edgar Hoover (May 23, 1940) (on file in FDR Library OF 10B). See also President's Personal File 200B: Message to Congress (May 16, 1940) (on file in FDR Library).

17. Letter from Franklin D. Roosevelt to J. Edgar Hoover (June 14, 1940); Letter from Franklin D. Roosevelt to Edwin Watson (June 12, 1940); Letter from J. Edgar Hoover to Stephen Early (Aug. 20, 1940), (on file in FDR Library OF 10B).

18. Letter from Franklin D. Roosevelt to Robert Jackson (May 21, 1940) (on file with Stephen Spingarn Papers, Harry S. Truman Library, Independence) (emphasis added).

[T]he Supreme Court . . . is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried out for the excellent reason that it is almost bound to lead to abuse of civil rights. It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called 'fifth columns' in other countries and in preparation for sabotage, as well as actual sabotage. It is too late to do anything about it after sabotage, assassinations, and 'fifth column' activities are completed. You are, therefore, authorized and directed in such cases as you approve, after investigation of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices direct to the conversations or other communications of *persons suspected of subversive activities* against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them in so far as possible to aliens.

Moving into a gray area of law, Roosevelt seized the initiative and let the Justice Department use wiretaps until the Supreme Court or Congress explicitly barred the practice. And amid the fears of Germany and Russia, there was little likelihood that, when the courts or Congress learned of this order, they would speedily, if at all, reverse the President.<sup>19</sup>

Roosevelt's memorandum was loosely drawn. Attorney General Jackson did not like it, presumably, as Francis Biddle, his successor, explained, because "it opened the door pretty wide to wiretapping of anyone suspected of subversive activities." As a result, according to Biddle, Jackson did not pass on each case, as the directive seemed to require, but let J. Edgar Hoover make the decisions.<sup>20</sup> Hoover, armed with this loosely drawn order, could easily stretch it to go well beyond what Roosevelt probably had intended.

Francis Biddle, when succeeding Jackson, reasserted oversight by the Attorney General. "I studied the applications carefully," wrote Biddle later, "sometimes requesting more information, occasionally turning them down when I thought they were not warranted. Most of the taps were," he explained, "on Communists, and on suspected spies in the German and Russian embassies and consulates, particularly after [Pearl Harbor]."<sup>21</sup>

How successful were Jackson and Biddle in restraining the FBI and other federal agencies in conducting wiretaps? What standards were used? Too many records are closed and possibly destroyed to allow precise answers, but there is enough information to permit us profitably to address these questions. Biddle, himself, has spoken obliquely on the subject. "The current gossip in Washington was," he later wrote, "that many of the government agen-

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19. See *Nardone v. United States*, 308 U.S. 338 (1939); *Weiss v. United States*, 308 U.S. 321 (1939); S. DASH, *THE EAVESDROPPERS* 386-402 (1959); Navasky & Lewin, *Electronic Surveillance*, in P. WATTERS & S. GILLERS, *INVESTIGATING THE FBI* 316-21 (1973); Theoharis & Meyer, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L. REV. 749, 756-59 (1968).

20. F. BIDDLE, *IN BRIEF AUTHORITY* 167 (1962).

21. *Id.*

cies were currently engaged in this kind of detective surveillance.”<sup>22</sup> There is no evidence that he moved to investigate the rumors or wanted to chide the agencies. Perhaps he did not want to know or to act. He understood that in wartime, the rationale of “national defense,” later to be translated into “national security,” could politically justify most intrusions upon privacy, and even violations of law. We know, for example, that Army intelligence, whatever its basis for authority, tapped the phones of Eleanor Roosevelt<sup>23</sup> and of many physicists in the Manhattan Project.<sup>24</sup>

J. Edgar Hoover, as the head of a powerful police system, knew how to please his nominal superiors—Roosevelt and Biddle—and thereby protect his organization from close scrutiny, even from unpleasant questions. The Bureau performed various favors for the President—often of a political nature. Hoover also charmed and flattered Biddle by sharing with him what the Attorney General described as “his extraordinarily broad knowledge of the intimate details of what my associates in the Cabinet did and said . . . their weaknesses and their associations.” These often revealing bits of information, gathered by the FBI, delighted the Attorney General, who seemed generally untroubled by the invasions of privacy. He believed that he would never use this information for mean or even ungentlemanly purposes, and so the disclosures did not bother him. His relationship with Hoover, according to Biddle, was cozy—of modest indiscretion, of some trust.<sup>25</sup>

#### B. The Truman Administration

Under President Harry S. Truman, Hoover’s coziness with Attorneys General continued; indeed, since they lacked the civil libertarian bent of Biddle, the relationships may even have been closer.<sup>26</sup> They helped expand the size and authority of the FBI, especially in the area of “national security,” as it came to be called in the Cold War. Hoover’s relations with Truman himself may have been more strained than were those with Roosevelt, but it does not appear that Truman’s suspicions of Hoover had much effect on the growth or power of the agency, its ability to violate the law, or its comfortable relationships with the Attorneys General.

Major General Harry Vaughan, Truman’s former military aide and crony, recently claimed that the new President cut off electronic surveillance (as initiated by Roosevelt) on members of the administration. According to Vaughan, when Truman first received a transcript of the FBI tap on

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22. *Id.* at 167-68.

23. N.Y. Times, Nov. 1, 1965, at 1, col. 3.

24. Memoranda from Leslie Groves (Feb. 3, 1943; Apr. 28, 1945) (on file in Groves Papers, Record Group 200, Modern Military Records, National Archives, Washington, D.C.).

25. F. BIDDLE, *supra* note 20, at 258, 259, 167-69.

26. A. THEOHARIS, SEEDS OF REPRESSION: HARRY S. TRUMAN AND THE ORIGINS OF MC-CARTHYISM 123-46 (1971).



Corcoran's phone and read of Mrs. Corcoran's dealings with her hairdresser, the President pungently declared, "I don't have time for this foolishness," and ended the taps.<sup>27</sup>

Truman already mistrusted Hoover and the FBI. In May 1945, for example, the President confided to his budget director, Harold Smith, that he disapproved of some of the Bureau's activities. Smith dryly added, "It was not altogether appropriate [for the FBI to collect materials] on the sex lives of Washington bureaucrats and members of Congress." "The President seemed," recorded Smith, "to agree heartily." They both realized that Hoover could use his information for political blackmail and intimidation, at a minimum to advance the interests of the Bureau. They were reluctant to grant it a building separate from the Justice Department, lest the agency become more independent.<sup>28</sup> Truman later admitted that he was worried that the FBI might become an American "gestapo."<sup>29</sup>

Hoover eagerly offered the politically useful fruits of wiretapping and surveillance to at least some members of the cabinet. In May 1946, for example, he sent Secretary of State James F. Byrnes a partial transcript of a phone conversation by J. Robert Oppenheimer, the nuclear physicist who was advising the State Department on international control of atomic energy. The conversation did not mention scientific matters but was bureaucratically indiscreet, for Oppenheimer expressed doubts about both a United States administrator (Bernard Baruch) and his plan.<sup>30</sup>

Secretary Byrnes, although a former Supreme Court Justice, did not rebuke Hoover for stepping over the line into political espionage. Presumably Byrnes expected to receive more information in the future. Hoover did send him other reports, possibly based on wiretaps, that alerted the Secretary to forthcoming public attacks on his foreign policy by leftist groups.<sup>31</sup>

There is no firm evidence that the President himself ever ordered wiretaps or surveillance of his adversaries within the two-party system. His aides were less restrained, and probably they believed that he approved of their efforts. In 1946, for example, after Harold Ickes blasted and blocked a Truman nominee to the cabinet, a Truman aide ordered a FBI investigation of Ickes to dig up political dirt.<sup>32</sup> Later, another aide planned to have the FBI, and possibly the CIA, investigate another administration critic, Henry Wallace, the former Secretary of Commerce, but backed away upon conclud-

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27. N.Y. Times, July 19, 1973, at 20, col. 7.

28. Harold Smith Diary (May 11, 1945) (on file in Truman Library).

29. *Id.* (Dec. 11, 1945).

30. Letter from J. Edgar Hoover to James F. Byrnes (May 23, 1946) (on file in Byrnes Papers, Robert Muldrow Cooper Library, Clemson University).

31. *Id.* (May 28, 1945).

32. Letter from J. Edgar Hoover to Harry Vaughan (Dec. 6, 1946) (on file in "FBI" folder, President's Secretary's File, Truman Library) [hereinafter cited as "FBI" folder, PSF].

ing that the news might leak out and embarrass the administration.<sup>33</sup> The Bureau, probably at the request of Secretary of Defense George C. Marshall, apparently also tapped the phone of at least one columnist (Drew Pearson) to trace information leaks, primarily regarding bureaucratic disputes. At one point, Truman apparently also targeted Pearson as an "enemy" for an Internal Revenue Service audit.<sup>34</sup>

Throughout Truman's years in office, Hoover kept sending him reports on Communist and leftwing groups, on civil rights organizations,<sup>35</sup> and sometimes on individuals (including Senator Joseph McCarthy)<sup>36</sup> or groups where the FBI had information that might be politically useful to the administration. There was no mention of wiretaps or bugs; usually the sources were described as "highly confidential," "highly reliable," or "confidential [and] believed to be reliable."<sup>37</sup> Such reports were filed in the President's secretary's files, a collection of highly valued documents in the President's outer office.

In 1947, for example, Corcoran was again the subject of a Hoover special message, this time that the former New Dealer was supporting Senator Robert LaFollette as chairman of the AEC and Bernard Baruch as Ambassador to Britain.<sup>38</sup> Other political intelligence also flowed into the White House: Newspapers were planning a series on organized crime and politicians that would be critical of the administration;<sup>39</sup> a scandal would soon break and "be very embarrassing to the Democratic Administration";<sup>40</sup> a labor union had defined its secret negotiating position;<sup>41</sup> and *Newsweek* had obtained a story on foreign policy from the State Department.<sup>42</sup> The intent of all these reports was to help prepare the administration and to help it guard against political embarrassment.

Many of the reports on leftist groups had the same function. It was hardly a subversive matter that Communists were influential in formulating a

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33. Letter from George M. Elsey to Clark Clifford (Aug. 25, 1948) (on file in General File-1948), Elsey Papers, Truman Library).

34. D. PEARSON, *DIARIES*, 1949-1959, at 167-68, 190-91 (1974).

35. See, e.g., Letters from J. Edgar Hoover to Harry Vaughan (Jan. 11 & 17, 1946; May 29, 1946); Letters from J. Edgar Hoover to George Allen (Sept. 25 & Dec. 13, 1946) (on file in "FBI" folder, PSF).

36. Letter from J. Edgar Hoover to Sidney Souers (Feb. 20, 1951) (on file in "FBI" folder, PSF).

37. Attorney General Nicholas Katzenbach later testified that "highly reliable" was, at least during his tenure, a euphemism for a "bug." 6 *Intelligence Activities Hearings* 202.

38. Letter from J. Edgar Hoover to Harry Vaughan (Feb. 15, 1947) (on file in "FBI" folder, PSF).

39. Letter from J. Edgar Hoover to Matthew Connelly (Jan. 27, 1950) (on file in "FBI" folder, PSF).

40. Letter from J. Edgar Hoover to George Allen (Dec. 13, 1946) (on file in "FBI" folder, PSF).

41. Letter from J. Edgar Hoover to Harry Vaughan (June 25, 1947) (on file in "FBI" folder, PSF).

42. Letter from J. Edgar Hoover to Attorney General Tom Clark (Apr. 1, 1946) (on file in "FBI" folder, PSF).

NAACP chapter's resolution on lynching; that a Negro rights organization was going to ask for a White House appointment;<sup>43</sup> that some left-wing groups were going to send telegrams protesting foreign policy;<sup>44</sup> or that another group was going to condemn the actions of the FBI and the Justice Department.<sup>45</sup>

Whatever Truman's personal doubts about the FBI, he never tried to halt this flow of political espionage. He never rebuked Hoover, never refused the messages, and apparently never considered them improper. Undoubtedly they were sometimes politically useful to the President, and he neither wanted to cut off the supply nor risk offending Hoover.

In 1946, upon the request of Attorney General Tom Clark, who was fearful of the communist threat at home, Truman reaffirmed Roosevelt's executive order of 1940 and expanded it to include cases "vitally affecting the domestic security, or where human life is in jeopardy."<sup>46</sup> The new directive allowed wiretapping in a large, ill-defined range of suspect political activities.<sup>47</sup>

Truman probably did not realize that the new order might significantly expand the range of authorized federal wiretapping. How much the new categories broadened the actual FBI practices cannot be determined, for most records on both the Roosevelt and Truman years remain closed or have been destroyed. Under the new order, Edward Condon, Director of the Bureau of Standards, among others, was wiretapped; but in view of the wartime wiretaps that Roosevelt ordered on Corcoran and Hopkins, we cannot be sure that the new order expanded the practice. Probably it did, for criteria under Attorneys General Clark and J. Howard McGrath, both of whom had little concern about civil liberties, were probably more elastic than under Biddle.<sup>48</sup>

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43. Letter from J. Edgar Hoover to George Allen (Sept. 25, 1946) (on file in "FBI" folder, PSF).

44. Letter from J. Edgar Hoover to Harry Vaughan (Jan. 17, 1946) (on file in "FBI" folder, PSF).

45. Letter from J. Howard McGrath to Harry Truman (Dec. 7, 1949) (on file in "Attorney General" folder, PSF).

46. Letter from Tom Clark to Harry Truman (July 17, 1946) (on file in Stephen Spingarn Papers, Truman Library with "I concur" written by Truman at bottom. Truman dated his note July 17, 1947, but that dating seems to be an error, for 1946 is probably the correct date.

47. Letter from George M. Elsey to Harry Truman (Feb. 2, 1950) (on file in Spingarn Papers, Truman Library). Elsey called attention to the fact that Clark's 1946 order greatly expanded the purview of the 1940 order. In particular, two parts of the 1940 order were omitted in the 1946 order: "[U]nder ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights"; and "[y]ou are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens." Attorney General McGrath denied that the 1946 order had broadened the categories beyond those of 1940, when he stated that there was no new policy or procedure since Roosevelt. Department of Justice Press Release (Jan. 9, 1950) (on file in Department of Justice Library).

48. For a discussion of the 1946 and 1940 orders, see Theoharis, *Document: Attorney General Tom Clark, Internal Security, and the Truman Administration*, 6 NEW U. THOUGHT no. 3, at 16 (1968).

In 1949, the *Coplon* case revealed that the FBI had kept various liberal citizens under surveillance and had a wide net of wiretaps.<sup>49</sup> Partly on the basis of Bureau sources (probably taps or bugs), Attorney General McGrath was able to warn Truman that a group would soon issue a report attacking the administration for “certain alleged practices of the Federal Bureau of Investigation and will recommend that you [order it] to cease wire tapping, mail opening, and illegal searches in which, according to the report, the Bureau engages.” The Attorney General went on in his letter to defend Hoover and the FBI. McGrath reminded Truman that Roosevelt had authorized the Attorney General to allow the tapping of persons suspected of subversive activities, and McGrath implied that the FBI acted, in each case, only with the express approval of the Attorney General and “only in cases involving espionage, sabotage, grave risks to the internal security of the nation, or [where] human lives are in jeopardy.” McGrath stated that there were “few cases” in these categories, that he and his predecessors had always exercised strict control of the FBI, and that the Bureau adhered to these rules<sup>50</sup>—dubious claims that were reiterated on other occasions.<sup>51</sup>

There is no record of any reply by Truman to McGrath’s disingenuous message. After receiving the Corcoran wiretaps and other FBI reports, the President had good reason to conclude that Bureau taps reached well beyond the categories specified by McGrath. Truman also knew that he was receiving FBI information, often of the type gained from wiretaps, that could be useful for partisan purposes. The FBI, in short, was helping the administration with political espionage.

The FBI had also illegally broken into various places, in what are called “black bag” jobs. In 1945, for example, their break-ins led to some arrests, but the Justice Department backed away from some prosecutions for fear that the illegal entries might be disclosed.<sup>52</sup> Since at least 1942, the FBI had been doing “black bag” jobs against dissident organizations,<sup>53</sup> and this practice continued after McGrath’s ambivalent order in 1952 that the FBI not break in to plant bugs.<sup>54</sup> The FBI had also been illegally opening

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49. N.Y. Times, June 10, 1949, at 10, col. 3; *id.* June 11, 1949, at 6, col. 1; *id.* June 12, 1949, at 1, col. 2; *id.* Dec. 1, 1949, at 28, col. 3.

50. Letter from J. Howard McGrath to Harry Truman (Dec. 7, 1949) (on file in “Attorney General” folder, PSF).

51. Department of Justice Press Release (Jan. 8, 1950). Also see the press release (under Clark) (March 31, 1949) (on file in Department of Justice Library).

52. See F. Cook, *supra* note 12, at 277-83; Memorandum from W.C. Sullivan to C.D. DeLoach (July 19, 1966), in 6 *Intelligence Activities Hearings* 357-58.

53. Between 1942 and 1968, the FBI committed more than 230 “black bag” jobs. N.Y. Times, Sept. 26, 1975, at 1, col. 2.

54. The 1952 order dated February 26, signed by McGrath, is ambivalent, if not contradictory. One paragraph ends: “I cannot authorize the installation of a microphone *involving a trespass* under existing law.” At first glance, that statement may seem to bar such installation, but actually it only refuses authorization. A later paragraph, after discussing the problems of defining tres-

mail,<sup>55</sup> though McGrath, in his letter of defense, had avoided this charge and told Truman, "It has been the long standing practice of investigative agencies to utilize mail covers. This is entirely authorized by law."<sup>56</sup> In at least one notable case, the FBI was forced to admit that it had continued a wiretap after arrest and had intercepted privileged communications between the defendant and her attorneys. An FBI agent perjured himself by denying that he knew of the taps.<sup>57</sup>

Despite these disclosures, the Justice Department continued to defend<sup>58</sup> the FBI and to deny that wiretapping policy had changed under Truman, even though the 1946 order, which was not disclosed to the public, had, by Clark's own admission at the time, enlarged the arena for federal wiretapping. So far as the record reveals, Truman never rebuked his associates for deceiving the public or for defending the FBI when its illegal activities became known.

### C. The Eisenhower Administration

The Eisenhower administration had less concern for civil liberties than did its predecessor, introduced a more repressive loyalty-security program, and may have relied more substantially on the FBI for partisan purposes.<sup>59</sup> The administration made even less effort to restrain Hoover. In 1954, Attorney General Herbert Brownell lifted McGrath's ambivalent order barring some illegal trespass, and issued a new ruling that seemed to approve most trespass to plant bugs. "For the FBI to fulfill its important intelligence function," Brownell informed Hoover (in words used earlier by McGrath), "considerations of internal security and the national safety are paramount and, therefore, may compel the unrestricted use of this technique [of bugging with trespass] in the national interest." The bugs should be used, he asserted, with

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pass, states: "The Department . . . will review the circumstances in each case in the light of the practical necessities of investigation and of the national interest [and] should adopt that interpretation which will permit microphone coverage by the FBI in a manner most conducive to our national interest." *Joint Hearings on Warrantless Wiretapping and Electronic Surveillance—1974 Before the Subcomm. on Administrative Practice and Procedure and the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 29 (1974).

55. San Francisco Chronicle, Oct. 2, 1975, at 10, cols. 1-2; 4 *Intelligence Activities Hearings* 148.

56. Letter from J. Howard McGrath to Harry Truman (Dec. 7, 1949) (on file in Truman Library).

57. N.Y. Times, Feb. 2, 1950, at 14, col. 3. Just before the trial, some FBI agents had destroyed wiretap evidence records. N.Y. Times, Nov. 3, 1950, at 24, col. 2. According to Matthew Connelly, at the September 15, 1950 cabinet meeting, "the President warned Cabinet officers that he is opposed to wire tapping and asked [the] Cabinet to watch this activity carefully." Matthew Connelly, Cabinet Meeting (Sept. 15, 1950) (on file in the Connelly Papers, Truman Library).

58. Department of Justice Press Release (March 31, 1949; Jan. 8, 1950) (on file in Department of Justice Library).

59. 2 SENATE SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-775, 94th Cong., 2d Sess. 237-38 (1976).

"discretion and intelligent restraint."<sup>60</sup> The evidence suggests that Hoover did not submit requests in each case, and the "national security" rationale probably allowed him, within broad limits, to do what he wished.<sup>61</sup>

Hoover, who earlier had leaked some FBI materials to friendly congressmen, also assisted the Eisenhower administration in its partisan attacks upon the Truman administration for allegedly harboring Communists. The FBI director contributed to the "smear" campaign that Truman had allowed Harry Dexter White (allegedly a known Communist) to stay in the administration and rise to high position.<sup>62</sup> To assist the Eisenhower administration in its effort to prove that Oppenheimer was a security risk, the FBI bugged his attorney's office and gave the AEC privileged conversations between the scientist and his lawyer.<sup>63</sup>

#### D. The Kennedy and Johnson Administrations

Under Kennedy and Johnson, the FBI served the administrations, provided some useful political intelligence, harassed Martin Luther King, and was allowed, perhaps without the explicit knowledge of the President or the Attorney General,<sup>64</sup> to continue the "black bag" jobs, and to expand its program for disrupting left-wing political groups. Initially conceived in the Eisenhower years to injure the Communist Party, this disruption program, called COINTELPRO (counterintelligence program), went well beyond intelligence gathering to include forgery, impersonation, *agents provocateurs*, and other illegalities.<sup>65</sup>

To trace news leaks from the Department of Justice, Attorney General Robert Kennedy, perhaps without knowing of the precedents under Roosevelt and Truman, authorized the FBI to wiretap some journalists, including reporters for the *New York Times* and *Newsweek*.<sup>66</sup> President Kennedy had the FBI use wiretaps in his battle with the steel industry over price increases in 1962, and he apparently also used—and illegally showed to a journalist—confidential Internal Revenue Service records on some businessmen.<sup>67</sup>

In both the Kennedy and Johnson administrations, with the explicit approval of Attorneys General Kennedy and Nicholas Katzenbach, the Bureau

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60. *Hearings on Warrantless Wiretapping*, *supra* note 54, at 30.

61. San Francisco Chronicle, Apr. 7, 1975, at 8, cols. 3-6.

62. Emerson, *The FBI as a Political Police*, in P. WATTERS & S. GILLERS, *supra* note 19, at 247-48.

63. L.A. Times, Dec. 28, 1975, at 4, col. 1.

64. On claims about knowledge of COINTELPRO, see Memorandum from J. Edgar Hoover to Attorney General Herbert Brownell (May 8, 1958); Memorandum from the FBI to Senate Select Committee (Jan. 12, 1976), in 6 *Intelligence Activities Hearings* 819-30, 992-95, 183, 301.

65. Exhibits 13-21, in *id.* at 377-407; COINTELPRO: THE FBI'S SECRET WAR ON POLITICAL FREEDOM 116-13 (C. Perkus ed. 1975).

66. REPORT ON POLITICAL ABUSE AND THE FBI, *supra* note 11, at 10, 16.

67. B. BRADLEE, CONVERSATIONS WITH KENNEDY 111-12 (1975).

wiretapped Martin Luther King because, as Robert Kennedy reportedly claimed, "of the possible Communist influence in the racial situation."<sup>68</sup> As Katzenbach later testified, the FBI stated that a "secret member of the Communist party . . . might be influencing the actions of Dr. King's movement in ways amicable to the interests of the Soviet Union and contrary to those of the United States." The taps were installed ostensibly "for the protection of Dr. King [because of the influence] of individuals with subversive backgrounds."<sup>69</sup>

We should linger on these justifications: There was no actionable offense, at most an indiscretion that pained the Government. Even the factual basis for that concern seems exaggerated, for some FBI agents have recently cast doubt upon it.<sup>70</sup>

Probably Kennedy and Katzenbach were trying to protect the civil rights movement from the taint of communism, which might impair its efficacy. "Anything which discredited Dr. King, or his non-violent Civil Rights movement, would have been a disaster to the Kennedy administration . . . to the Johnson administration [and] to the country," Katzenbach later explained.<sup>71</sup> Therefore, they concluded that "protection" for King was necessary. Yet, they also knew that Hoover had a vendetta against King, that letting the FBI install a tap on him was like letting Senator Joseph McCarthy tap Dean Acheson. Authorization of the tap probably also involved a trade-off: There was no way of stopping Hoover, they knew, so it was better to allow him to do what he would do anyway, avoid antagonizing him, and thereby protect other administration interests.<sup>72</sup> This explanation, if correct even in rough outline, signifies that the Attorney General and others in two recent administrations recognized how little authority they had over Hoover: He could violate the law at will, and neither the Executive nor Congress would hold him to account.

Under John F. Kennedy and continuing under Lyndon B. Johnson, Hoover greatly expanded COINTELPRO, which was aimed at the Socialist Workers Party, segments of the peace movement, the civil rights movement, the Black Panthers, other New Left groups, and the Klan.<sup>73</sup> This strategy of disruption and harassment, involving, among other crimes, burglary, forgery, and incitement to violence, was more extreme than what Nixon and his

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68. Quoted from a paraphrase by Courtney Evans, in 6 *Intelligence Activities Hearings* 168. Apparently Attorney General Kennedy did not approve electronic surveillance in July 1963 but authorized it in October.

69. *Id.* at 209, 168.

70. *San Francisco Chronicle*, March 10, 1975, at 14.

71. 6 *Intelligence Activities Hearings* 208. See also Burke Marshall Oral History (Jan. 19-20, 1970) (on file in John F. Kennedy Library).

72. For a similar analysis, see Dershowitz, *Before Watergate and After: Unchecked Wiretapping*, 172 *NEW REPUBLIC*, May 31, 1975, at 13.

73. 2 *Intelligence Activities Hearings* 22-30.

"plumbers" directed against the Democratic party in 1972. The ill-famed Huston Plan of the Nixon administration was the logical successor to COINTELPRO and "Operation Hoodwink" (begun in 1966), a program to incite organized crime to attack the Communist Party.<sup>74</sup>

Perhaps Presidents Kennedy and Johnson, their Attorneys General, and other members of the Justice Department did not know of COINTELPRO, the earlier similar program directed against the Communist Party, or "Operation Hoodwink." There was also little desire to pry into such matters, to risk uncovering the unpleasant, or to do combat with Hoover. When occasional charges against the FBI appeared, they did not provoke the Attorney General or his assistants to investigate.<sup>75</sup> The Justice Department tolerated organized lawlessness, much as Hoover himself had tolerated organized crime. In each case, there was danger in combat, so it was better not to know.

Johnson and Hoover seem to have developed a cozy, though uneasy, relationship: two men of power courting, exploiting, and mistrusting each other. Hoover, following his earlier successful tactics with Roosevelt and Biddle, happily shared with Johnson juicy morsels about the President's political adversaries and allies.<sup>76</sup> Johnson requested and secured from the Bureau what the Church Committee described as "purely political intelligence [about Senators] obtained as a by-product of otherwise legitimate national security electronic surveillance of foreign intelligence targets."<sup>77</sup> The President probably used some of this information against his opponents on the Hill.<sup>78</sup>

There were also other ways in which Hoover served Johnson politically. In the Bobby Baker case, for example, the FBI refused to help the Criminal Division of Justice in an investigation on the grounds that security was inadequate. Undoubtedly Hoover was reluctant to assist an inquiry that Johnson opposed and feared, one that might reach to the White House. The Criminal Division was forced to turn elsewhere (to Treasury's Bureau of Narcotics) for assistance.<sup>79</sup> When Johnson learned of the aid provided by Narcotics, a presidential assistant ordered the FBI to investigate the head of the Criminal Division and the helpful members of Narcotics, especially for associations with Robert Kennedy, then Johnson's political rival.<sup>80</sup>

Johnson was able to use the willing FBI for political espionage, and like

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74. 6 *Intelligence Activities Hearings* 77.

75. *Id.* at 216-17, 241.

76. San Francisco Examiner, Dec. 14, 1975, at 7, cols. 1-4; San Francisco Chronicle, Oct. 13, 1975, at 1, col. 6.

77. REPORT ON POLITICAL ABUSE AND THE FBI, *supra* note 11, at 10.

78. San Francisco Examiner, Dec. 14, 1975, at 7, cols. 1-4.

79. Memorandum from FBI, Background Information Concerning Department's Request for Body Recorder in Bobby Baker Investigation in 1965 (Feb. 3, 1975), in 6 *Intelligence Activities Hearings* 722-24.

80. Memorandum from C.D. DeLoach to Clyde Tolson (Jan. 17, 1967); Memorandum from M.A. Jones to Mr. Wick (Jan. 19, 1967), in 6 *Intelligence Activities Hearings* 728-31.



some of his predecessors, he comfortably used it to gain information on other rivals within the two-party system. At his request, at the 1964 Democratic Convention, for example, the Bureau wiretapped and supplied him with information on King and the Mississippi Freedom Democratic Party.<sup>81</sup> Johnson's lame justification was that he feared a disruption (violence), a rationale similar to earlier claims by predecessors who had cited national security or domestic security for personal or partisan benefit.<sup>82</sup> Johnson even went so far as to have the FBI investigate Barry Goldwater's staff in 1964.<sup>83</sup>

### E. Conclusions

The record of these years reveals that some presidents and their attorneys general used the FBI for political espionage, that all accepted political information on adversaries and allies, and all allowed the FBI to operate outside the law. Often, it appears, presidents and their aides, invoking "national security," easily justified many of these acts, including break-ins. With the Cold War, amid the fear of communism and then new threats of domestic dissidence, the FBI exploited these opportunities to try illegally to disrupt various leftist groups, and presidents and attorneys general were either uninformed of such actions or preferred to acquiesce. They made no effort to curtail Hoover's harassment of King. By the Johnson administration, the President went so far as to use the FBI to spy on rival forces at his own party's nominating convention.

Though some bits and pieces of evidence on illegal FBI actions leaked out over the years, not until Watergate did the press and public express concern about such matters. Why, we may ask, did these earlier leaks not constitute important news for the press and public? Why did mainstream publications not probe further? And, even now, why is there still so much outrage about the Watergate break-in and similar acts against mainstream political movements, but so little concern about the more severe harassment of marginal political groups, especially those on the Left?

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81. Memorandum from C.D. DeLoach to John Mohr (Aug. 29, 1964), in 6 *Intelligence Activities Hearings* 495-502; Memorandum from H.N. Bassett to Nicholas Callahan (Jan. 29, 1975), in 6 *Intelligence Activities Hearings* 503-09. DeLoach later mentioned the "vital tidbits" supplied. Memorandum from C.D. DeLoach to William Moyers (Sept. 10, 1964), in 6 *Intelligence Activities Hearings* 510. The FBI even "thwarted the [MFDP's] plans to parade this burned out car" as part of a protest against Johnson. Memorandum from C.D. DeLoach to John Mohr (Aug. 29, 1964), in 6 *Intelligence Activities Hearings* 498.

82. 6 *Intelligence Activities Hearings* 179-80.

83. Memorandum from FBI, Sullivan Memorandum to John Dean (Senator Barry Goldwater) (Jan. 31, 1975), in 6 *Intelligence Activities Hearings* 539; cf. *id.* at 190. At Johnson's request, the FBI was also directed to monitor telecasts of the Senate Foreign Relations hearings to determine whether senators were receiving information from Communists. Memorandum from FBI, Sullivan Memorandum to John Dean (Coverage of Television Presentation, Senate Foreign Relations Committee) (Jan. 31, 1975), in *id.* at 720.

## III

## THE GROWTH AND ABUSE OF EXECUTIVE POWER IN FOREIGN AFFAIRS

The political abuses of the national security agencies (especially the FBI) at home can be explained, in large measure, by the fear of foreign threats and the accompanying expansion of presidential power: the erosion of congressional authority, the growth of executive war powers and the authority of the Commander in Chief, the systematic use of deceit and manipulation, the deployment of the CIA for covert warfare, and the commitment without a congressional declaration of United States troops in brief and lengthy undeclared wars.

In the few decades before the debacle in Vietnam and the uncovering of Watergate, most scholars of American history and of the contemporary political system enthusiastically greeted the expansion of presidential authority in foreign affairs. Greatness in the White House was measured by the standard of the active President—one who overrode the opposition of conservative critics, seized the opportunity of crisis, and expanded the powers of his office. The world was too complex, the Congress too slow, too disorganized, sometimes too isolationist, and the people too unsure and too uninformed. The President could not wait upon traditional methods. He had to seize the initiative, take bold action, not allow constitutional niceties to impede him. If he was wrong, if he went too far to protect the nation, so the argument ran, let the Congress take action or the courts rebuke him.<sup>84</sup>

Bipartisan foreign policy represented, according to this liberal faith, the politics of responsibility. Its critics, who often challenged the arrogation of presidential authority, were judged political Neanderthals. Such critics as Robert A. Taft<sup>85</sup> and Charles A. Beard,<sup>86</sup> who challenged the emerging foreign policy and charged presidents with violating the Constitution, failed to receive a serious hearing from most scholars.

By the liberal standard, and most scholars were liberal, Roosevelt's foreign policy usually received plaudits. He had led the nation to war against a hated enemy. That was enough. Constitutional issues seemed of little importance, for they were most often the questions that so-called isolationists raised. Whatever his seeming defects in domestic policy, Truman too approached this standard for presidential greatness. He had greatly expanded the power of his high office and advanced the interests of the nation. Some liberal critics quibbled about his having exaggerated to gain the Truman Doctrine in 1947,

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84. See, e.g., *EISENHOWER AS PRESIDENT* (D. Albertson ed. 1963).

85. J. PATTERSON, *MR. REPUBLICAN: A BIOGRAPHY OF ROBERT A. TAFT* 232-50, 285-98, 474-96 (1972).

86. Leighton, *Beard and Foreign Policy*, in *CHARLES A. BEARD: AN APPRAISAL* 175-84 (H. Beale ed. 1954).

but most quickly forgot that issue amid his later bold policies.<sup>87</sup> Few understood the objections when Taft challenged Truman for going to war in Korea without a congressional declaration of war. And fewer paid much attention to the CIA, which Truman created and Eisenhower also exploited for covert warfare. Eisenhower was, instead, castigated for his Whiggish tendencies. But Kennedy and the early Johnson, before the mass souring on the Vietnam War, embodied the liberal standards for the active presidency. Until about the late sixties, few liberal critics emphasized the dangers of the active presidency—its enthusiasm for power, its expansion of authority, its overriding or circumvention of Congress, its use of secrecy and deceit.<sup>88</sup>

#### A. The Roosevelt Administration

These liberal standards have contributed, often in subtle ways, to the very conditions that made Watergate possible. Few who examine President Roosevelt's conduct toward Germany in 1941 can deny that he created unfortunate precedents: of deceit and manipulation, fabrication and exploitation of crises, casual stretching of the Constitution.

In July 1941, Roosevelt made an executive agreement with Iceland to place marines on the island, and without congressional authorization he dispatched troops there. To justify his action, he argued that there was a danger that Germany might otherwise occupy the island and block "the steady flow of munitions to Britain—which is a matter of broad policy clearly approved by Congress."<sup>89</sup>

Senator Taft opposed Roosevelt on constitutional grounds. With a war raging nearby, the "presence of troops would inevitably lead to war [for the United States]," Taft argued, so the President was, in effect, bringing the nation to war without abiding by constitutional requirements. In words that a later generation would rediscover, the senator declared that the Senate should not acquiesce "in acts of the President that might nullify for all time the constitutional authority distinctly reserved to Congress to declare war."<sup>90</sup>

The presence of United States troops in Iceland, as Taft predicted, did lead to an undeclared naval war with Germany. Since the troops required convoys to supply them, the question arose: Why not allow American ships to join the convoys? Roosevelt did so. But he carefully concealed the new policy

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87. B. BERNSTEIN, *POLITICS AND POLICIES OF THE TRUMAN ADMINISTRATION* 3-11 (1970); A. HAMBY, *BEYOND THE NEW DEAL: HARRY S. TRUMAN AND AMERICAN LIBERALISM* 169-94, 453-78, 505-16, 422-40 (1973).

88. *See, e.g.,* A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 177-207 (1973) (note the brief attention paid to Kennedy and Vietnam).

89. Statement by Franklin D. Roosevelt (July 7, 1941), in 10 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 256 (S. Rosenman ed. 1950).

90. Speech by Robert A. Taft (July 10, 1941), in R. TAFT, *A FOREIGN POLICY FOR AMERICANS* 31 (1951).

from Congress and the people. In early September, a United States ship (the *Greer*) trailed and reported the location of a German submarine to British planes, which then dropped depth charges; the U-boat promptly attacked the American ship.<sup>91</sup> Roosevelt then seized upon the incident to justify escorting convoys and to give an order to "shoot on sight."

In his dramatic public address to the nation on September 11, 1941, the President never mentioned that the *Greer* had provoked the sub; he described the American ship as innocently "carrying mail to Iceland," and declared, "I tell you the blunt fact that the German submarine fired first upon this American destroyer without warning, and with deliberate design to sink her." The Nazi danger to American ships he likened to a rattlesnake, and concluded, "You do not wait until he has struck you before you destroy him."<sup>92</sup>

It was a masterful performance, anticipating by thirty-three years Lyndon Johnson's "Gulf of Tonkin" address. Perhaps Roosevelt did not yet know the whole truth when he spoke, and he may have believed that the *Greer* was innocent. He did not wait for more information. Instead, he seized the opportunity to reverse policy, to change the neutrality laws, and to move the nation into an undeclared war with Germany. Had Japan not attacked Pearl Harbor, this undeclared war in the Atlantic would probably have erupted into World War II.

There is firm evidence, drawn from recently opened British papers, that even before the *Greer*, Roosevelt had been looking for an incident with Germany to lead the United States to war. At the Atlantic Charter meeting with Churchill in August, the President had promised, according to the Prime Minister's secret report, that "he would wage war but not declare it and that he would become more and more provocative. If the Germans did not like it, they could attack American forces. Everything was to be done to force an incident," Churchill reported. The President "made it clear that he would look for an 'incident' which would justify him in opening hostilities."<sup>93</sup>

Examining the public record without access to Churchill's papers, Charles A. Beard in 1948 condemned Roosevelt for premeditated deception and for usurpation of powers that he shared with Congress. Beard's angry book concluded that "the American Republic has arrived [at the] theory that the President of the United States possesses limitless authority to misrepresent and secretly to control foreign policy, foreign affairs, and the war power." The President "may, to secure legislation in furtherance of his secret designs, misrepresent to Congress and the people both its purport and the policy he in-

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91. W. LANGER & E. GLEASON, *THE UNDECLARED WAR, 1940-1941*, at 743-44 (1953).

92. Address by Franklin D. Roosevelt (Sept. 11, 1941), in 10 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT*, *supra* note 89, at 384, 390.

93. Addendum to War Cabinet Minutes 84 (41), 19 August, 1941, 11:30 A.M., Cabinet Papers, 65/19 (on file in Public Record Office, London). See also Bernstein, *Roosevelt and the Coming of War with Germany*, — INTELLECT — (1977).

tends to pursue under its terms." The President may also promise that he will follow a "policy contrary to war" and yet secretly conduct an undeclared war. "He may publicly represent to Congress and the people that acts of war have been committed against the United States, when in reality the said acts were secretly invited and even initiated by [the United States]."<sup>94</sup>

In other times, this bludgeoning book might have provoked a probing dialogue, but in 1948 it simply outraged many American intellectuals, including most historians, who could not countenance Beard's continuing criticism of Roosevelt. Some reviewers acknowledged Roosevelt's mendacity, but they usually agreed<sup>95</sup> with an eminent historian who explained that Roosevelt had "acted like the physician who must tell the patient lies for the patient's own good." Roosevelt had revealed a "certain lack of faith in the basic tenets of democracy"; but the "masses are notoriously shortsighted" and statesmen had to "deceive them into awareness of their long-run interests." "Deception of the people may in fact become increasingly necessary," this historian warned, "unless we are willing to give our leaders in Washington a freer hand."<sup>96</sup>

This analysis was close to the prevailing view among American historians, political scientists, and diplomats by the late forties. Much of the established scholarship expressed a fear of the masses and a faith in elites. For George Kennan,<sup>97</sup> Walter Lippmann,<sup>98</sup> and Hans Morgenthau,<sup>99</sup> three men whose thought shaped the emerging orthodoxy, the message was often blunt and compelling: the need for an activist Executive defining the national interest, subduing or avoiding the passions of the electorate and the legalism-moralism of earlier policy, and overriding the localism and parochialism of Congress. The people were usually wrong and the experts were usually right. "The unhappy truth is that the prevailing public opinion has been destructively wrong at the critical junctures," Lippmann declared.<sup>100</sup>

What could be done if Congress and popular opinion continued to "devitalize, to enfeeble, and to eviscerate the executive powers?"<sup>101</sup> The answers, emerging as a supple and powerful body of thought, provided the rationale for what a later generation would come to fear as an "imperial presidency":

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94. C. BEARD, *PRESIDENT ROOSEVELT AND THE COMING OF THE WAR, 1941: A STUDY IN APPEARANCES AND REALITIES*, 582-83, 598 (1948).

95. A. SCHLESINGER, JR., *MR. BEARD ON F.D.R.'S PRE-WAR POLICY*, *reviewed*, N.Y. Times Book Review, Apr. 11, 1948, at 4, col. 3; *id.* at 29, col. 2; Craig, *Our Foreign Policy in 1941*, 37 YALE REV. 762 (1948).

96. T. BAILEY, *THE MAN IN THE STREET: THE IMPACT OF AMERICAN PUBLIC OPINION ON FOREIGN POLICY* 13 (1948).

97. G. KENNAN, *AMERICAN DIPLOMACY, 1900-1950*, at 56-73, 89-101 (1951).

98. See generally W. LIPPMANN, *ESSAYS IN THE PUBLIC PHILOSOPHY* (1955).

99. Morgenthau, *The Decline and Fall of American Foreign Policy*, 135 NEW REPUBLIC, Dec. 10, 1956, at 11.

100. W. LIPPMANN, *supra* note 98, at 23-24.

101. *Id.* at 49.

the contrivance of crises, the emphasis on expertise, the disregard of Constitutional niceties, the manipulation of the electorate, and the erosion of congressional power.

### B. The Truman Administration

This dominant analysis represented, in effect, implicit approval of much of the Truman administration's policy. Let me discuss three important examples—the Truman Doctrine (1947), intervention in Korea (1950), and the growth of the CIA (1947-52)—to illustrate and to explain the course of these developments.

It is now generally agreed that Truman exaggerated the crisis in Greece in 1947 to gain congressional approval for aid to Greece and Turkey. In so doing, he was following the advice of Senator Arthur Vandenburg, Republican leader of bipartisanship, who counseled, "Scare hell out of the country."<sup>102</sup> To strengthen the argument for aid, Truman portrayed the issue in Greece as a battle between the forces of freedom and totalitarianism.<sup>103</sup> Such a description was, he knew, quite false. His problem was a familiar one faced by most Presidents and analyzed presciently by Lippmann: how to lead the nation, to get Congress to approve needed programs. Truman's solution was to let advocacy become deceit.

Truman's intervention in the Korean War, more than any other action in his administration, reduced the power of Congress and threatened to establish a new presidential power: the unilateral authority to commit substantial American forces in a foreign war, in the absence of an attack on America for a sustained period. When Taft argued that Truman did not have this legal authority and that he was usurping congressional powers,<sup>104</sup> Dean Acheson, the Secretary of State and a brilliant attorney, cavalierly dismissed the challenge as typical senatorial quibbling. Acheson even advised Truman not to accept a proffered congressional resolution, and instead to rely upon his constitutional powers as President and Commander in Chief. The Secretary of State and the President both feared establishing a "precedent in derogation of presidential power to send our forces into battle."<sup>105</sup>

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102. E. GOLDMAN, *THE CRUCIAL DECADE: AMERICA, 1945-1955*, at 29 (1956); cf. D. ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* 219 (1969).

103. Address by Harry S. Truman (March 12, 1947), in *PUBLIC PAPERS OF THE PRESIDENTS: HARRY S. TRUMAN, 1947*, at 176-80 (W. Reid ed. 1963). Consider, for example, this sentence: "There is no other country to which democratic Greece can turn." *Id.* at 177. See also Bernstein, *Truman, the Eightieth Congress, and the Transformation of Political Culture*, 2 *CAPITOL STUDIES* 65, at 70-75 (1973).

104. 96 CONG. REC. 9320-23 (1950). For similar objections, see *Washington Post*, June 28, 1950, at 9, col. 3. See also Bernstein, *The Week We Went to War: American Intervention in the Korean Civil War: Part I*, 54 *FOREIGN SERVICE J.* 6, 6-9, 33-35; *Part II* in *id.* 8, 8-11, 33-34.

105. D. ACHESON, *supra* note 102, at 410, 414-15. See also Memorandum (June 30, 1950) (on file with the Elsey Papers, Truman Library).

The Truman administration, which created the CIA and used it for covert warfare, left a strong institutional legacy to future administrations. In April 1950, a distinguished panel of government officials approved an important document (NSC-68), which justified virtually any action in the Cold War:<sup>106</sup>

The integrity of our system will not be jeopardized by any measures, covert, or overt, violent or non-violent, which serve the purpose of frustrating the Kremlin design, nor does the necessity for conducting ourselves so as to affirm our values in actions as well as words forbid such measures. . . .

This document, while never technically official policy, expressed the thinking of top leaders on the obligation of the United States government to do whatever was necessary to frustrate the Kremlin. This analysis easily carried over into domestic policy, and NSC-68 even called for "development of internal security programs."<sup>107</sup> The policy paper also expressed succinctly the rationale for covert warfare.

The original legislation that established the CIA in 1947 did not include any explicit provision for covert warfare. When congressional committee members asked about operational activities at the hearings on the legislation, government spokesmen provided "reassuring answers."<sup>108</sup> Only later would it appear that one loosely-worded provision (the agency could "perform such other functions as the National Security Council may . . . direct")<sup>109</sup> opened the way for what Congress had not intended.<sup>110</sup>

By 1948, the National Security Council had created within the CIA an organization for secret political activities (Office of Special Operations),<sup>111</sup> which conducted covert operations in Italy.<sup>112</sup> In 1949, when the earlier legislation was amended, the Director described the agency's functions simply as the "coordination and production of foreign intelligence pertaining to na-

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106. National Security Council Document No. 68, at 12 (on file in PSF).

107. *Id.* at 57.

108. Ransom, *Congress and Intelligence Agencies*, in CONGRESS AGAINST THE PRESIDENT 155-57 (H. Mansfield ed. 1975); COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT 50-55 (1975).

109. Section 102(d)(5), National Security Act of July 26, 1947, ch. 343, 61 Stat. 498 (codified at 50 U.S.C. 403(d)(5) (1970)).

110. *Hearings on the Nomination of William E. Colby Before the Senate Comm. on Armed Services*, 93d Cong., 1st Sess. 13-14 (1973). Apparently the original legislation may have been designed to include (and to conceal the intent of) covert operations. 7 *Intelligence Activities Hearings* 50-51; cf. Interview with Walter Phorzeimer (Jan. 30, 1975), in D. Klaus, Draft History of the CIA (Dec. 1975) (unpublished manuscript on file with author).

111. See National Security Council Document 4, Modern Military Records (on file in National Archives); References to NSC 4A, 10, & 10/2, in D. Klaus, *supra* note 110, at 13-16.

112. 7 *Intelligence Activities Hearings* 66. Clark Clifford, Truman's former counsel and adviser, testified that in 1948, "[t]he United States saw fit to conduct a covert operation in Italy. Had they done so openly, it not only would have been counter-productive, but I think it would have assured a Communist victory." *Id.* In 1963, Truman denied that the CIA had conducted covert operations in his administration. Washington Post, Dec. 22, 1963, at 11, col. 3, § A. His memory was faulty or he was lying.

tional security.” The manager of the bill in the House of Representatives assured inquiring congressmen that the CIA had no internal security functions and operated only in the area of foreign intelligence. Since the hearings in committee were secret, we cannot be sure whether this contradicted what had been said in the committee.<sup>113</sup>

The 1949 legislation greatly expanded the Director’s powers, allowed him broad discretion in the spending of funds (for “objects of a confidential, extraordinary, or emergency nature”) on personal voucher, and practically removed the agency from any congressional oversight. The CIA had become a secret arm of the executive, with a secret budget, known to only a few congressmen and tucked away in appropriations for other agencies. Most congressmen were voting on a budget they could not see for activities they could not know. That was the logical extension in one section of the government of the “national security” rationale.<sup>114</sup>

### C. The Eisenhower Administration

Under Eisenhower, the significant expansion of executive power did not occur in areas of public scrutiny, involving the powers of the President as Commander in Chief, but in the use of the CIA for covert activities—to overthrow governments in Iran (1953), Guatemala (1954), and Laos (1959); to assassinate national leaders, including Patrice Lumumba; and to try to kill Fidel Castro.<sup>115</sup> Eisenhower himself probably authorized these attempted assassinations.<sup>116</sup> The CIA was not very independent of the President and it undoubtedly had his trust, for its director was Allen W. Dulles, the brother of Secretary of State John Foster Dulles. The Congress, sharing prevailing Cold War assumptions, never pursued the occasional charges that the CIA was conducting covert warfare. Probably most congressmen preferred not to know the details, underestimated the magnitude of agency actions, and acceded to the course of events. The result was that men of good will, while accepting the need for covert activities, could deny what they suspected and proclaim that the United States, unlike foreign “isms,” was different: moral and innocent.<sup>117</sup>

Unlike Truman, Eisenhower was often inclined to Whiggish principles as

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113. Ransom, *supra* note 108, at 157. In executive session, the House committee learned that the 1949 bill envisaged covert activities beyond intelligence gathering, but no member of the committee revealed this fact in the floor debate. 1 SENATE SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 755, 94th Cong., 2d Sess. 133 (1976).

114. *Id.* at 158-66.

115. Wise, *Covert Actions Abroad*, in THE CIA FILE 19-22 (R. Borosage & D. Marks eds. 1976).

116. SENATE SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 415, 94th Cong., 1st Sess. 51-70, 108-14 (1975).

117. For supporting evidence without my conclusions, see Ransom, *supra* note 108, at 159-66.



President. He was usually more scrupulous constitutionally and more astute politically, for he secured congressional approval for most major interventions with American forces. In 1955, for example, he gained a congressional resolution that "authorized [the President] to employ the Armed Forces of the United States as he deems necessary" in defense of Formosa, the Pescadores, and related islands. It was a blank check granted in good faith and with very few questions.<sup>118</sup> Two years later, in advance of armed intervention, he asked for a similar grant of power to use American troops in the Middle East "against overt armed aggression from any nation controlled by international Communism."<sup>119</sup> This time, partly under the prodding Senator J. William Fulbright, chairman of the Senate Foreign Relations Committee, the Congress stopped short of the request and issued a general declaration of policy. If a real emergency developed, Fulbright reasoned, let the President act and then justify his action. It was dangerous, Fulbright stressed, for Congress to abdicate its warmaking power in advance.<sup>120</sup> In 1958, when Eisenhower did briefly commit about fourteen thousand troops in Jordan, he seemed to return to Acheson's position that the President had this power. Congress did not challenge him.<sup>121</sup>

#### D. The Kennedy Administration

President John F. Kennedy, not burdened by Whiggish principles, was firmly committed to expansion of the nation's influence abroad and to the full use, even the enlargement, of presidential power. He continued to use the CIA to help overthrow governments, a policy dramatized by the debacle at the Bay of Pigs. That invasion, planned under Eisenhower and approved by Kennedy, was the first dramatic revelation to the American public of the agency's role ("dirty tricks") in the execution of foreign policy. Learning a limited lesson from the Bay of Pigs, Kennedy tried to bring the CIA more closely under his control and to improve its efficiency for similar operations. The revamped agency continued the vendetta against Castro<sup>122</sup> and even plotted his assassination, probably with the approval of the President.<sup>123</sup> The CIA,

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118. 1 D. EISENHOWER, *THE WHITE HOUSE YEARS* 608 (1963). See also *id.* at 552-60 for a discussion of events. Senator Wayne Morse charged presciently that the resolution gave the President "a predatory authorization" to wage war. *Id.* at 468. Lippmann concluded that the President already had the constitutional authority to commit troops without congressional sanction. *Washington Post*, Jan. 27, 1955, at 13, col. 1.

119. 2 D. EISENHOWER, *supra* note 118, at 269-73.

120. 103 CONG. REC. 1855-59 (1957).

121. 2 D. EISENHOWER, *supra* note 118, at 273-75. In 1965, Eisenhower indicated that he had cited the Eisenhower Doctrine as justification when he discussed matters with Prime Minister Harold Macmillan in 1958. *Id.* at 273. See also Bernstein, *Foreign Policy in the Eisenhower Administration*, 50 *FOREIGN SERVICE J.* 17, 17-20, 29-30, 38 (1973).

122. Branch & Crile, *The Kennedy Vendetta*, 250 *HARPER'S* 49 (Aug. 1975).

123. ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, *supra* note 116, at 116-65, 197-215.

with presidential approval, also operated clandestinely in Laos to stave off communism and to shore up pro-American forces.<sup>124</sup>

Who was fooled by the administration's denials of these actions? Not Castro and his fellow Cubans, nor the Laotians, who were victims of a substantial secret United States war. The Russian and Chinese governments, as well as the governments of allies, knew about these ventures. It was the American people, much of the trusting press, and many congressmen who were deceived. Secrecy had become an important strategem for concealing the United States Government's illicit activities from its own citizens.

No study of the growth and abuse of presidential power would be complete without some attention to the Vietnam war, partly because it, almost as much as Watergate, has compelled a reassessment of the presidency. It was Kennedy, building on precedents established by his immediate predecessors, who sent soldiers (euphemistically designated "advisers") to fight in Vietnam. There was no declaration of war, no explicit congressional authorization, not even an executive admission that the "advisers" often served as combat soldiers.<sup>125</sup> The thin veil of fiction was sufficient for a few years to deceive the American people and most of Congress.

#### E. The Johnson Administration

Lyndon B. Johnson greatly escalated the war. Exploiting an alleged North Vietnamese attack on United States ships in the Gulf of Tonkin on August 4, 1964, he castigated the "unprovoked aggression" and asked Congress for a resolution that it "approves and supports the determination of the President, as Commander in Chief, to take all necessary measures . . . to prevent further aggression [in Southeast Asia]."<sup>126</sup> Unlike his predecessors, Johnson was asking for an endorsement *after* he had already committed substantial numbers of troops, but he did not believe that he needed congressional approval to escalate the conflict. Though Under-Secretary of State Katzenbach claimed that the Gulf of Tonkin resolution was the "functional equivalent" of a declaration of war,<sup>127</sup> Johnson apparently wanted it primarily for political protection, not constitutional sanction.<sup>128</sup>

In securing the resolution, the Johnson administration had fabricated a

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124. Branfan, *The President's Secret Army: A Case Study—The CIA in Laos, 1962-1972*, in THE CIA FILE, *supra* note 115, at 46-47.

125. N. SHEEHAN, *et al.*, THE PENTAGON PAPERS, at 104-14 (1971).

126. *Hearings on S.J. Res. 189 Before the Senate Comm. on Foreign Relations and the Senate Comm. on Armed Services*, 88th Cong., 2d Sess. 1 (1966). For a discussion of the North Vietnamese attacks of August 2, which the United States probably provoked, see *id.*, at 258-61 and I.F. STONE, *POLEMICS AND PROPHECIES 1967-1970*, at 307-37 (1970).

127. *Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 82 (1967).

128. L. JOHNSON, *THE VANTAGE POINT: PERSPECTIVES ON THE PRESIDENCY, 1963-1969*, at 115-81 (1971).

crisis to justify, and gain sanction for, programs it had already planned. The administration claimed that North Vietnamese ships on August 4 had fired torpedoes at United States ships which had then returned the fire.<sup>129</sup> Later, partly under pressure from suspicious congressmen, facts trickled out that undermined this distorted version of events. Secretary of Defense Robert McNamara admitted a few years later that the United States ships had opened fire first—"When it was evident from [enemy craft] maneuvers that they [enemy craft] were pressing for attack positions." Even then he did not acknowledge an equally troubling fact: The United States task force commander had cabled Washington a few hours after the alleged attack that the reports of enemy torpedoes might be dubious, for there was "freak weather," "an overeager sonarman," and "no actual visual sighting."<sup>130</sup>

Probably we will never know precisely what happened in the Gulf of Tonkin. Yet we do know that the administration, on the basis of evidence it possessed, did intentionally deceive the Congress and the people. Johnson, McNamara, and their associates probably believed that their ultimate goals were justified, even noble. Like Roosevelt, as one historian had explained in 1948, they had to "deceive [the people] into an awareness of their own long-run interests."<sup>131</sup>

#### F. Conclusions

The historical record shows that during the nearly three decades before Nixon, various administrations have deceived and manipulated the Congress and the public on major issues of foreign policy. In the postwar years, they have also used covert warfare and other "dirty tricks" against various nations. In view of these continuing strategies, why should Americans be so surprised by the deceit and dishonesty of Richard Nixon? He did not invent the tactics. He inherited them, and like his predecessors, he did not worry about violating the law. Nor, like them, did he expect to get caught.

Why, we may ask, are citizens, the press, and the Congress so much more disturbed about Nixon's policy (with Watergate) than with his own and his predecessors' policies in foreign affairs? Watergate was a subversion and corruption of the political process, but it did not raise issues of life and death, of war and peace. Presidential policy in foreign affairs has raised precisely these issues, and at critical junctures it has been assisted by secrecy and deceit.

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129. *Hearings on S.J. Res. 189*, *supra* note 126, at 4-10, 21-22.

130. *Hearings on The Gulf of Tonkin, the 1964 Incidents Before the Senate Comm. on Foreign Relations*, 91st Cong., 2d Sess. 15-16, 54 (1970).

131. T. BAILEY, *supra* note 96, at 13.

## IV

## HAS THE SYSTEM BEEN TRANSFORMED?

In important ways, Watergate has dramatized for scholars and laymen the problems that the painful war in Vietnam first uncovered. It is valuable that we again consider questions of executive authority, that we reconsider the critiques by Taft and Beard, that we lament the excesses that liberal standards for the presidency endorsed, that we recognized the illegal actions of the FBI, CIA, and other agencies, and that we acknowledge that they sometimes slipped beyond even executive control.

We should not be sanguine that our agonizing reassessments, the unraveling of Watergate, or subsequent congressional investigations will greatly change matters. Consider, for example, the behavior of President Gerald Ford and Secretary of State Henry Kissinger in the *Mayaguez* incident: exploiting a minor (and predictable) seizure by expanding it into a crisis, flexing our military muscles, and bombing Cambodia after the American sailors were freed.<sup>132</sup> Or, consider that not one indictment had emerged by Spring 1976 from the revelations by the Church Committee; nor, so far as we know, had anyone in the CIA or FBI even been dismissed. Or, consider that the Pentagon kept a double set of books on bombings in North Vietnam, yet the Congress approved the promotion of one of the Air Force generals who had falsified the reports.<sup>133</sup>

Perhaps the most eloquent evidence of the difficulty in imposing standards of personal responsibility, or requiring that national leaders adhere to the law, was the support that many leaders of the national security system bestowed on embattled Richard Helms in the winter of 1974-1975. At that time, evidence had emerged that he had participated in the coverup of Watergate, that he might have perjured himself before Congress, and that he had allowed illegal mail openings and domestic snooping. Rallying around him, former and present government officials attended a party designed, as the *Washington Post* put it, to cheer up "an old friend, a comrade wounded by recent [disclosures]." <sup>134</sup>

Senator Stuart Symington applauded him for doing a "splendid job" as Director of CIA. Robert McNamara, formerly Secretary of Defense and then head of the World Bank, warmly toasted Helms. According to the *Post*, "McNamara wanted all in the room to know: whatever Dick Helms did,

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132. Stone, *Conned in Cambodia*, NEW YORK REVIEW OF BOOKS, June 12, 1975, at 16.

133. San Francisco Chronicle, June 11, 1975, at 8, cols. 1-2.

134. Washington Post, Feb. 2, 1975, at 1, col. 1; *id.* at 20, col. 1. The Rockefeller Commission concluded that Helms knew that the CIA domestic programs were illegal and that they were being conducted even though he denied this under oath. REPORT TO THE PRESIDENT, *supra* note 108, at 132-33.

whether it was over the line [legal] or not, the former secretary supported him fully." "Helms is an honorable man," Secretary of State Henry Kissinger declared, while rebuking William Colby, Helms' successor, who had disclosed the CIA's domestic spying.<sup>135</sup> The guiding assumption of McNamara and the others was that Helms was being pilloried for doing what was necessary, for what the Congress and much of the nation had tacitly approved; that a squeamish Congress and public were now unfairly revising the standards of conduct for public officials by demanding that they neither commit nor conceal crimes. For nearly forty years, as McNamara and Kissinger knew, that had not been the standard: Crimes on behalf of "national security" had been necessary and moral.

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135. Washington Post, Feb. 2, 1975, at 1, col. 1; *id.* at 20, col. 1.